LIBRARY
SUPREME COURT, U. S.

No. 71-1271

In the Supreme Court of the United States

OCTOBER TERM, 1971

DON SCHNEIDER, SP-4, UNITED STATES ARMY,
PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
HARLINGTON WOOD, Jr.,
Acting Assistant Attorney General,
ALAN S. ROSENTHAL,
WILLIAM D. APPLER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1271

DON SCHNEIDER, SP-4, UNITED STATES ARMY,
PETITIONER

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 453 F. 2d 345. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1972. The petition for a writ of certiorari was filed on April 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

446 735 72

QUESTIONS PRESENTED

1. Whether an order of the base commander at the Army's chemical and biological warfare testing base, Dugway Proving Ground, Utah, delaying on-base distribution of a publication ridiculing the command structure at the base on the ground that dissemination of the publication presented "a clear danger to military loyalty, discipline or morale," and Army Headquarter's subsequent order prohibiting on-base distribution of the ~~issue~~ publication were constitutionally impermissible under the First Amendment.

2. Whether the fact that the commander acted without first according petitioner, the publisher, an opportunity for an administrative hearing was a denial of due process under the Fifth Amendment.

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Army Regulation 210–10, ¶5–5 is set forth at Pet. App. C.

STATEMENT

1. Petitioner, an Army enlisted man assigned to the Army's chemical and biological warfare testing base, Dugway Proving Ground, Utah, was at the time in question the editor and publisher of an "underground newspaper," *The Daisy*, which is distributed off-base at various establishments (Complaint, Exhibit D, p. 16).[1] In the Spring of 1970, he applied to the base commander for permission to distribute issues 1 and 2 of *The Daisy* on the base. Acting under Army regulation 210–10, ¶5–5(c) (Pet. App. C), the commander ordered that on-base distribution of these issues be delayed pending a decision by Army Headquarters on the distribution question. (See AR 210–10, ¶5–5(d); Pet. App. C.)

While the matter was still before the Department of the Army, petitioner, in September 1970, commenced the present civil suit in the United States District Court for the District of Utah, seeking a judicial declaration that he be permitted to distribute all issues of *The Daisy* on the base. Shortly thereafter, Army Headquarters ruled that the on-base dissemination of the newspaper's first two issues should be permitted (Pet. App. B–5).

---

[1] Petitioner has since completed his military obligation. But since other enlisted men are now preparing subsequent issues of the underground newspaper, and presumably stand ready to distribute the issue that is involved here in the event that the decision below should be reversed, the questions raised in the petition do not appear to be moot. Cf. *Dash* v. *Commanding General*, 307 F. Supp. 849 (D.S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981.

On October 16, 1970, petitioner submitted a request to distribute issue 4 of *The Daisy* on base (Pet. 7). Again the base commander delayed such distribution pending a final decision by Army Headquarters, as provided in AR 210-10 (Pet. 8); on December 11, 1970, the Department of the Army prohibited the on-base distribution of the fourth issue (Pet. 8).

2. Petitioner amended his complaint in the district court to add a prayer for declaratory and injunctive relief with respect to the on-base distribution of the fourth issue of *The Daisy*. Following an evidentiary hearing, the district court held (Pet. App. B-3): "Army Regulation 210-10 * * *, considered separately or in connection with the subsequent directives mentioned, is not unreasonable, capricious or arbitrary, is not unreasonably vague or indefinite, is not unconstitutional on its face or otherwise, and constitutes a reasonable and appropriate regulation within the jurisdiction and authority of the Department of the Army." The court then examined issue 4 of *The Daisy* and concluded (Pet. App. B-4 to B-5) that "it seems intended and designed primarily to hold the Army and its mission up to ridicule, derision or disgust, to set enlisted men against officers, military personnel against civilians, and to provoke general discord and disharmony." It held (Pet. App. B-5) that "neither in law nor reason can such a publication be entitled to distribution on a military post in the face of the reasonable findings and order of that command * * *." On appeal, the court of appeals affirmed *per curiam* (Pet. App. A).

ARGUMENT

I. Petitioner contends here, as he did below, that the Army's restriction, pursuant to AR 210–10, ¶5–5, on the on-base distribution of issue 4 of *The Daisy*[2] was an unwarranted infringement on the rights of free press and free speech, as guaranteed by the First Amendment.[3] We disagree.

Under Army regulation 210–10, ¶5–5(c), a base commander is authorized to delay the on-base distribution of a publication which "he considers undesirable," if it appears that such distribution would present "a clear danger to the loyalty, discipline or morale" of the servicemen under his command.[4] Here,

---

[2] No restriction was placed on publication of *The Daisy*; nor did the Army interfere in any way with the distribution of the newspaper off the base (See Pet. App. E–4 to E–5).

[3] It appears that petitioner has abandoned in this Court the contention that Army regulation 210–10 is unconstitutional on its face. At all events, the constitutionality of the regulation was correctly upheld by both courts below (see Pet. Apps. A and B). The regulation has, moreover, been consistently upheld in the face of similar constitutional attacks by other courts of appeals considering the question. See *Noland* v. *Iola*, C.A. 6, No. 71–1661, decided April 21, 1972; *United States* v. *Flower*, 452 F.2d 80 (C.A. 5); *Dash* v. *Commanding General*, *supra*; *Yohe* v. *Resor*, 431 F.2d 690 (C.A. 4), certiorari denied, 401 U.S. 982. And cf. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886; *Weissman* v. *United States*, 387 F.2d 271, 274 (C.A. 10).

[4] As the district court pointed out (Pet. App. B–3), the standards to be applied under the regulation are set forth in some detail in Department of Defense Directive 1325.6 (September 12, 1969), reproduced at Pet. App. D. and in the Judge Advocate General's Memorandum, "Guidance on Dissent," reproduced at Pet. App. E. Distribution is to be the rule, not the exception, and the base commander is not to delay distribution "simply because he does not like [the] contents" of a pub-

the commander testified that issue 4 of *The Daisy* appeared to be designed to drive a wedge between the civilian and military communities at Dugway, and that this would in his judgment interfere with the carrying out of the installation's assignment (Tr. 19).[5] He pointed out (*ibid.*) that, because of the highly sensitive nature of the chemical and biological defense testing done at the base, "[i]t takes the utmost in cooperation on the part of all members of that testing team * * * [and] a great deal of respect, man for man, to make this program work." And, as the court below observed (Pet. App. A–4), in explaining how the publication undermined the program, the commander "included specific references to passages of ridicule amplified by explanations of the perceived detrimental effect on the troop discipline, loyalty, and morale."[6]

The district court, after hearing the commander's testimony and "carefully examin[ing] the contents of issue number 4 of The Daisy * * *" (Pet. App. B–4), found as a fact that the publication "seems intended

---

lication (Pet. App. E–3), or because the publication is unfairly critical "of government policies or officials" (Pet. App. E–4). In each instance, "a commander must have cogent reasons, with supporting evidence, for any denial of distribution privileges" (*Ibid.*).

[5] "Tr." references are to the transcript of proceedings in the district court.

[6] For example, issue 1 of *The Daisy* includes a cartoon showing an enlisted man "accidentally" shooting an officer, as well as a short item describing a company executing its commanding officer (Complaint, Exhibit D, pp. 3, 4). In generally ridiculing military officers, the articles refer to the Dugway staff as, among other terms, "the Hitlers of H.H.C." and the "Mini Pig" (*id.*, pp. 11, 16).

and designed primarily to hold the Army and its mission up to ridicule, derision or disgust, to set enlisted men against officers, military personnel against civilians, and to provoke general discord and disharmony" (Pet. App. B–4 to B–5). The court of appeals agreed that this finding was "supported by the record" (Pet. App. A–4).

It is, of course, well recognized that "[i]n reviewing military decisions, [civilian courts] must accommodate the demands of individual rights and the social order in a context which is far removed from" those encountered in civilian litigation. *Noyd* v. *Bond*, 395 U.S. 683, 694; *Dash* v. *Commanding General*, *supra*. The "overriding demands of discipline and duty * * *" (*Burns* v. *Wilson*, 346 U.S. 137, 140) within the military warrant in proper circumstances some limitation upon a soldier's freedom of expression which might not otherwise be considered acceptable in civilian life. See, *e.g.*, *Cortright* v. *Resor*, 447 F. 2d 245, 252 (C.A. 2), certiorari denied, 405 U.S. 965; *O'Mara* v. *Zebrowski*, 447 F. 2d 1085, 1089 (C.A. 3); *Callison* v. *United States*, 413 F. 2d 133, 135–136 (C.A. 9); *Raderman* v. *Kaine*, 411 F. 2d 1102, 1104 (C.A. 2); and see *Dash* v. *Commanding General*, *supra*, 307 F. Supp. at 852.

This is just such a situation. The publication in question has been found by both courts below to be such as to have a serious detrimental effect on the performance and morale of servicemen stationed at the base. The limited restriction imposed by the Army on its distribution on base—without, however, restricting publication of the paper or the distribution of

issue 4 off the base—was thus constitutionally permissible under the First Amendment. As the district court observed (Pet. App. B–5):

> To allow this [on-base distribution], in principle, would compromise the constitutional right of the executive to reasonably provide for the common defense, would permit all manner of similar interferences with the legitimate mission of military establishments and by such abuse under the guise of freedom of speech might tend to erode or to throw into question this vital right in its far-reaching appropriate applications. * * *

Nor are the decisions below in conflict with *Kiiskila* v. *Nichols*, 433 F. 2d 745 (C.A. 7), or *United States* v. *Bradley*, 418 F. 2d 688 (C.A. 4), as petitioner seems to suggest. Neither *Kiiskila* nor *Bradley* involved any restriction upon the right of servicemen to distribute literature on a military base. Indeed, the plaintiffs in those cases were civilians who were not "in any way subject to military discipline [itself]" (433 F. 2d at 750). For that very reason, the Fourth Circuit in *Bradley* explicitly declined to decide the constitutional questions raised here.

2. Petitioner also contends that the failure of the military to accord him a hearing before prohibiting the on-base distribution of issue 4 of *The Daisy* denied him due process of law under the Fifth Amendment.

But, as the Fourth Circuit pointed out in *Yahr* v. *Resor*, *supra*, 431 F. 2d at 691, "[w]ithin the military establishment, and under the regulations in question, the commanding officer has primary responsibility for

determining the impact of the newspaper on the men in his command." Due process does not require that he afford a hearing to the publisher of such material as is involved here before barring its dissemination on the base. Compare *United States* v. *Jelinski*, 411 F. 2d 476, 477 (C.A. 5); *O'Mara* v. *Zebrowski*, *supra*, 447 F. 2d at 1090; *Agrati* v. *Laird*, 440 F. 2d 683, 684 (C.A. 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HARLINGTON WOOD, JR.,
Acting Assistant Attorney General.
ALAN S. ROSENTHAL,
WILLIAM D. APPLER,
Attorneys.

MAY 1972.